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No. _____

In The

Supreme Court of the United States

October Term, 1994

RUSSEL LEIK and JOSE LLOREN,

Petitioner,

v.

JAIME SANTIAGO,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Wisconsin

PETITION FOR WRIT OF CERTIORARI AND APPENDIX TO PETITION

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39PP

QUESTION PRESENTED

Whether state courts, citing state procedural rules, can disregard the substantive federal rights of a defendant in an action under 42 U.S.C. § 1983 to an immediate appeal as of right from a denial of the defense of qualified immunity.

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OPINIONS BELOW

The opinions of the Wisconsin Court of Appeals and the Wisconsin Supreme Court are unpublished and are attached.

JURISDICTION

The Supreme Court of Wisconsin issued its decision on May 10, 1995. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

> 808.03 Appeals to the court of appeals. (1) APPEALS AS OF RIGHT. A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order entered in accordance with s. 806.06(1)(b) or 807.11(2) or a disposition recorded in docket entries in ch. 799 cases or traffic regulation or municipal ordinance violation cases prosecuted in circuit court which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

Sec. 808.03, Wis. Stats.

SUMMARY OF REASONS WHY THIS COURT SHOULD GRANT THE PETITION

I. State courts should not be allowed to use their rules of procedure to deny a defendant, in an action filed under 42 U.S.C. § 1983, the right to an appeal from a denial of qualified immunity.

A. This court has recognized that the denial of qualified immunity is immediately appealable as a right.

B. The majority of the state courts which have considered the question have concluded that such adverse decisions must be immediately appealable as a right.

C. Not granting defendants the right to an immediate appeal substantially and irreparably denies those defendants the protection qualified immunity offers.

1. The effect of the Wisconsin Supreme Court's decision is that in state court, qualified immunity no longer provides immunity from suit.

D. The Wisconsin court's decision discourages defendants from litigating § 1983 actions in the state courts.

STATEMENT OF CASE

James Santiago filed this case pro se in state court on October 15, 1987, and filed an amended complaint on about March 24, 1989. Mr. Santiago is an inmate confined within the Wisconsin Correctional System and was diagnosed in 1987 with amyotrophic lateral sclerosis (ALS) also known as Lou Gehrig's disease. Mr. Santiago alleged in his amended complaint that between approximately October 20, 1987 and November 16, 1987, defendant Russel Leik was deliberately indifferent to his serious medical need when Leik refused to transfer Santiago to the Waupun Correctional Institution and defendant Dr. Jose Lloren was deliberately indifferent when he allegedly did not arrange for Mr. Santiago to have assistance in feeding while Santiago was confined at the Columbia Correctional Institution.

After various pretrial matters were resolved, the defendants filed their first motion for summary judgment. The defendants claimed that the undisputed facts showed that they were not deliberately indifferent to Santiago's

serious medical needs. In the alternative, the defendants argued that if defendants' actions violated Santiago's constitutional rights, then those rights were not clearly established and that therefore defendants were entitled to qualified immunity.

On July 16, 1990, the circuit court granted defendants summary judgment not on the merits, but on qualified immunity. The court concluded that Santiago failed to allege the deprivation of a clearly established constitutional right.

Mr. Santiago appealed that decision to the Wisconsin Court of Appeals and on October 28, 1993, the Wisconsin Court of Appeals reversed the circuit court and held:

> If, as [Santiago] claims, through deliberate indifference Dr. Lloren did not provide him with eating assistance so he could obtain the nutrition required as part of the treatment of his serious medical condition, then Dr. Lloren, as the prison doctor, subjected him to an eighth amendment violation. If, as he claims, Leik knew Santiago was not obtaining that assistance at CCI, and Leik, through deliberate indifference, failed to transfer him to WCI where he could have the assistance he needed, then Leik, too, subjected Santiago to an eighth amendment violation.

Santiago v. Leik, 179 Wis. 2d 786, 794, 508 N.W.2d 456 (Ct. App. 1993) (footnote omitted).

The defendants petitioned the Wisconsin Supreme Court for review. The defendants complained that the court of appeals failed to correctly analyze the issue of qualified immunity. In particular, the defendants

objected to the fact that the court of appeals only examined the allegations in Santiago's complaint. After all, the defendants filed a comprehensive motion for summary judgment showing that under the undisputed facts, the defendants were entitled to qualified immunity on Santiago's Eighth Amendment claim. The Wisconsin Supreme Court did not grant the petition.

After remittitur on June 21, 1994, the defendants' filed a second motion for summary judgment and submitted additional evidence to the circuit court showing that Santiago's "claims" regarding the defendants were not true.

In this second motion for summary judgment, defendants once again asked the circuit court to grant them judgment and argued that there were no genuine disputes as to any of the material facts. Even though the Wisconsin Court of Appeals had concluded that Mr. Santiago alleged the denial of a clearly established constitutional right, the defendants attempted to establish in the circuit court with this second motion that under the undisputed facts, Dr. Jose Lloren and Russel Leik did not in fact deny Santiago any clearly established constitutional right.

On March 3, 1995, in a terse two page decision, the Wisconsin circuit court found, without further elaboration, that material facts were in dispute and denied both parties' request for summary judgment.

Leik and Lloren filed a timely notice of appeal to the Wisconsin Court of Appeals.

Mr. Santiago moved the Wisconsin Court of Appeals to dismiss defendants' appeal. On March 30, 1995, the court of appeals granted that motion and dismissed the appeal. The court of appeals held:

The order denying the motion for summary judgment is not appealable as of right. The order is not final. It does not dispose of the entire matter in litigation as to one or more of the parties. Section 808.03(1), STATS. Barnhill v. Bd. of Regents, 166 Wis.2d 395, 415, 479 N.W.2d 917, 925 (1992), does not hold that an order denying a motion to dismiss a complaint on summary judgment on qualified immunity grounds is a final order. As the Barnhill court noted, that is the federal rule. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). The Barnhill court dealt with the issue of qualified immunity after the case had been tried on the merits, exercising its "law-making function." Barnhill, 166 Wis.2d at 416, 417, 479 N.W.2d at 925.[1] Our supreme court has never departed from the final order rule, even when double jeopardy has been claimed and rejected by the trial court. See State v. Jenich, 94 Wis.2d 74, 97a, 288 N.W.2d 114, 117 (1980).

Because the order denying the defendants' motion to dismiss the complaint is not final, defendants' appeal must be dismissed. On occasion, we have treated appeals from nonfinal orders as petitions for leave to appeal, granted the petitions and dealt with the merits. We decline to do so here.

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[1] Burkes v. Klauser, 185 Wis.2d 309, 517 N.W.2d 503 (1994) is also not to the contrary. That appeal commenced with a

> petition to this court for leave to appeal, which we granted.

Santiago v. Leik, et al., No. 95-0778, slip op. at 2-3 (Wis. Ct. App. March 30, 1995) (P-Ap. A4).

The defendants, Leik and Lloren, petitioned the Wisconsin Supreme Court for an order requiring the court of appeals to reinstate defendants' appeal on the ground that the court of appeals had misinterpreted its own precedent, and on the ground that under Felder v. Casey, 487 U.S. 131 (1988), the state court was not free to deny the defendants their right to appeal from a lower court's decision denying qualified immunity.

On May 10, 1995, the Wisconsin Supreme Court issued an order which denied the petition for review and the request for a supervisory writ.

STATEMENT OF FACTS

Although this petition presents purely a question involving legal procedure, the defendants briefly restate the facts to impress the compelling nature of their case on the underlying question of qualified immunity and justify the issuance of the relief requested. These facts highlight the importance of why qualified immunity must, as a substantive right under federal law, shield defendants from the burden and expense of trial even when those actions are filed and tried in the state courts.

As already indicated, James Santiago is a prisoner in the Wisconsin prison system. Dr. Lloren was a physician at the Columbia Correctional Institution (CCI) and Russel Leik was the classification chief. As the classification chief, Russel Leik's job was to place inmates

in various prisons upon recommendation by the respective prison Program Review Committees (PRC).[1]

In his amended complaint, filed under 42 U.S.C. § 1983, Santiago alleged that between October 20 and November 23, 1987, while he was confined to the Columbia Correctional Institution, Dr. Lloren and Leik violated his Eight Amendment right to be free from cruel and unusual punishment. Specifically, Santiago alleged that Dr. Lloren failed to insure that during this period of time there would be adequate provisions made for Santiago's feeding. With respect to Russel Leik, Santiago alleged that Leik failed to transfer him to the Waupun Correctional Institution before November 23, 1987, where Santiago alleged that he could have received better medical care.

A. Russel Leik.

Russel Leik was the classification chief for the Wisconsin Department of Corrections. Between October 13, 1984 and April 30, 1986, while Santiago was confined in Minnesota, Leik was not aware that Santiago was allegedly suffering from ALS.

On April 30, 1986, Santiago was transferred from Minnesota to the United States Penitentiary at Marion, Illinois. Leik was not informed as to any aspect of the medical care needed or being provided to Santiago in the federal system.

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[1]Pursuant to Wis. Admin. Code § DOC 302.18, et. seq., the program review committee makes recommendations to the classification chief on various aspects of an inmate's confinement, including recommendations for transfers to other institutions.

On September 1, 1986, Santiago wrote to Leik complaining of his placement in Marion. Nowhere in this letter did Santiago mention any medical concerns or problems. On December 4, 1986, Santiago again wrote to Leik complaining of his placement in Marion, but again did not mention any medical concerns or problems.

On July 28, 1987, the Federal Bureau of Prisons informed Wisconsin that Santiago had been diagnosed with ALS and requested that the State of Wisconsin make arrangements to transfer Santiago back to a Wisconsin facility.

Santiago was returned to Wisconsin on August 17, 1987, and was assigned to the Columbia Correctional Institution. Leik's decision to place Santiago at CCI was made after consulting with the State Bureau of Correctional Health Services as to Santiago's medical needs.

Leik was informed that as of August 1987, Santiago's health needs could be met at either Columbia Correctional Institution or Waupun Correctional Institution. Specifically, Linda Kleinsteiber, a registered nurse and the supervisor of Patient Care Services told Leik:

> Based on the medical information available to me, it was my opinion that in August, 1987 plaintiff was not in need of infirmary or twenty-four hour nursing care, and that plaintiff could be placed in general population status at either Columbia Correctional Institution or Waupun Correctional Institution with monitoring by the Health Services Unit staff. I informed Leik of my assessment on August 6, 1987.

Therefore, Leik accepted the PRC's recommendation and placed Santiago at CCI.

On or about September 29, 1987, Santiago wrote Russel Leik and claimed CCI could not meet his general medical needs. Santiago made no mention of any problem with nutrition or eating problems.

On October 28, 1987, Russel Leik wrote to Santiago. In that letter Leik told Santiago:

> Upon receipt of your letter your case was reviewed. Contact was made with Correctional Health Services Director Barbara Whitmore, and your case was discussed with her. The medical authorities have supervision over the physicians at all the correctional institutions. I will rely on the recommendation of the medical staff as to where you should be placed and where they can best handle your medical treatment. I will forward a copy of your letter and my response to them so that they are aware of your concerns regarding this issue. When they have made a judgment they will refer the matter to the Program Review Committee at Columbia and they will act upon that recommendation.
>
> Rest assured we will seek to place you at a facility which can provide you the best medical services possible, as recommended by the Bureau of Correctional Health Services.

On October 31, 1987, Santiago wrote a letter to a number of persons including Russel Leik. In that letter, Santiago generally complained about the care he was

receiving at CCI. He specifically complained about having to eat cold food.[2]

On November 13, 1987, Santiago sent another letter to a number of individuals including Russel Leik. Santiago again complained about his general care. Santiago claimed to have not eaten a warm meal in over two weeks and that he was having increasing difficulty in "managing" his hands to eat a meal.

It is true that Russel Leik could have transferred Santiago, but Leik had no reason to make such a move. Russel Leik placed Santiago at CCI after consulting with health services and after Linda Kleinsteiber told Leik that Santiago could be placed at CCI. Santiago admitted these facts.

B. Dr. Jose Lloren.

Dr. Jose Lloren was a physician duly licensed to practice medicine. On August 17, 1987, the day Santiago arrived at CCI, Dr. Lloren reissued Santiago's medications, and also ordered him vitamin supplements. Dr. Lloren also ordered that appointments for neurology and physical therapy consultations be scheduled at the University of Wisconsin Hospitals and Clinics (UWHC).

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[2] This complaint, however, would be insufficient to raise a question of the level of plaintiff's care under the Eighth Amendment as "the allegation of deprivation of hot meals also fails to state a claim of cruel and unusual punishment. . . ." Hoitt v. Vitek, 497 F.2d 598, 601 (1st Cir. 1974). "The mere fact that food is cold or otherwise cosmetically unappetizing does not mean that it does not meet constitutional standards." Stickney v. List, 519 F. Supp. 617, 620 (D. Nev. 1981); Hamm v. DeKalb County, 774 F.2d 1567, 1575 (11th Cir. 1985).

On August 18, 1987, Dr. Lloren examined Santiago. On August 21, 1987, quinine and a food supplement were ordered for Santiago.

Dr. Lloren again examined Santiago on September 2, 1987. Santiago requested that a note be given to security officers informing them of his difficulty with opening his mouth when he was experiencing cramps or numbness in his tongue. Dr. Lloren ordered that such a note be written. Dr. Lloren also ordered that Santiago could have his typewriter in his cell at all times, including segregation, due to his difficulty in writing.

On September 15, 1987, Santiago was seen at UWHC for a neurology consultation. As a result of this consultation, it was determined that Santiago should be admitted to the University of Wisconsin Hospitals.

Santiago was admitted to UWHC for five days from September 23, 1987, to September 28, 1987. During the stay, Santiago underwent extensive testing which confirmed the diagnosis of ALS.

As a result of the evaluation, UWHC recommended that Santiago's food supplements be increased, that his quinine sulfate be increased, and that Santiago be allowed Tylenol every four to six hours as needed. These changes in Santiago's medications were ordered on September 28, 1987.

Santiago was also evaluated for physical therapy needs on September 25, 1987, at UWHC. Although Santiago was advised to perform general strengthening/endurance exercises for his upper extremities, no formal regimen of physical therapy was recommended by the physical therapist.

On September 30, 1987, Dr. Lloren examined and spoke with Santiago. Dr. Lloren ordered that a note be

sent to the officers on Santiago's housing unit to inform them of the activities of daily living that Santiago had difficulty performing. Dr. Lloren also ordered that regular appointments at UWHC be scheduled.

On October 12, 1987, Santiago was again seen at UWHC for pulmonary testing. On October 13, 1987, Santiago was returned to UWHC for a neurology follow-up. On October 15, 1987, Santiago was again examined at UWHC for evaluation of an appropriate physical activity level and aerobic exercise capacity.

Dr. Lloren examined and spoke to Santiago on October 20, 1987. At this appointment Santiago expressed concerns about his progressive difficulty in feeding himself due to his hand problems, and complained of eye sensitivity due to bright lights (photophobia). Santiago requested a substitute for the food supplement because its texture made him nauseated. Santiago also discussed his gym exercises with Dr. Lloren.

In response to Santiago's concerns of October 20, 1987, Dr. Lloren ordered that Santiago be given milk and graham crackers instead of the previous food supplement, that he be allowed to wear dark glasses indoors, and that a neurology follow-up be scheduled for him at UWHC. Dr. Lloren advised Santiago that he should not lift weights. Dr. Lloren also recommended that Santiago be transferred to Waupun Correctional Institution for twenty-four hour service, care and supervision of activities of daily living if Santiago's clinical condition worsened.

On October 26, 1987, Santiago returned to the UWHC for exercise capacity testing. On November 6, 1987, Dr. Lloren examined and spoke to Santiago at which time he discussed the progression of his ALS, and the possible future need for tube feeding. Dr. Lloren increased Santiago's prescription for Baclofen and issued

Elavil to decrease excess salivation, and scheduled another appointment in one week.

On November 13, 1987, Santiago returned again to the UWHC this time for both physical therapy and occupational therapy evaluations. The physical therapist recommended that Santiago continue with independent activities of daily living and mobility activities. She stated that no modality intervention was needed at the time. Modality intervention is the manipulation of the patient's muscles. The occupational therapist recommended that Santiago be provided with adaptive equipment to assist himself with eating, dressing, bathing and typing.

When Santiago returned to CCI, Dr. Lloren met Santiago and examined him. Three days later on November 16, 1987, Dr. Lloren ordered that Santiago be given the adaptive equipment. That same day Santiago was given a cup, washing mitt, hair brush, splint with typewriter eraser, splint/toilet paper holder, wrist splint and plastic plate holder. Arrangements were made to have loops and velcro sewn on his clothes to assist him in dressing himself.

The next day, November 17, 1987, Dr. Lloren observed Santiago eating lunch and noted his increasing difficulty in eating. On November 18, 1987, Dr. Lloren dictated orders to the infirmary staff at WCI in anticipation of Santiago's transfer to Waupun Correctional Institution.

C. Facts relevant to the question of qualified immunity.

Mr. Santiago's consistent argument against granting the defendants qualified immunity has relied on general propositions that bore no relevance to the facts. Mr. Santiago has repeatedly argued that the case law was

clearly established that prison officials must provide him with adequate food and that they must remove him from a life-threatening situation.

The first problem with Santiago's case is that he attempts to hold Dr. Lloren and Russel Leik accountable for the actions of others; actions which the undisputed facts show that neither defendant participated in or approved of. Santiago has not and cannot allege that either of the defendants was personally involved in all of the alleged problems. The second problem with Santiago's case is that he asserts, at best, a generalized constitutional right. However, even the Wisconsin courts have recognized that:

> Merely alleging a general violation of a right that may be clearly established by the constitution or a statute is insufficient clarity of established law to justify withholding qualified immunity. For example, an allegation that an action violates one's freedom of speech protected under the First Amendment is too general to strip a public official of qualified immunity.

Barnhill v. Board of Regents, 166 Wis. 2d 395, 408, 479 N.W.2d 917 (1992).

Defendants have always admitted that it is axiomatic that prison officials cannot deprive inmates of adequate food, cannot deliberately maintain an inmate in a life-threatening situation or otherwise be deliberately indifferent to an inmate's serious medical needs. See Estelle v. Gamble, 429 U.S. 97 (1976), reh'g denied, 429 U.S. 1066 (1977). However, merely repeating these truisms is insufficient to rebut the defendant's defense of qualified immunity in light of the facts that have been submitted to the courts below. In other words, it should

not have been sufficient for the circuit court to accept Mr. Santiago's invitation and ascertain in a general sense that the right existed and, therefore, hold that defendants were not entitled to qualified immunity.

Mr. Santiago contends that the defendants violated a clearly established right to remove him from an allegedly life-threatening situation. Mr. Santiago contends that his medical needs were so serious that remaining at CCI was a danger to his life. However, the undisputed facts conclusively established that the health services unit at the Waupun Correctional Institution, the place Santiago so desperately wanted to go, would not and did not provide him with any better or different care than was available at CCI.

The sum and substance of Mr. Santiago's complaint and his defense to qualified immunity was that his medical care was so allegedly bad that Dr. Lloren should have known it violated his constitutional rights. After examining the kind and level of care given to Mr. Santiago, the defendants argued that if the circuit court found that his medical care fell below the constitution's threshold, a reasonable person would not have been able to predict it. In other words, the conclusion that Mr. Santiago's care violated his Eighth Amendment rights would not have been apparent to a reasonable person in 1987 when the alleged deprivation occurred.

Mr. Santiago's claim against the classification chief is perhaps the most remarkable aspect of this case. Mr. Santiago attempts to hold Russel Leik accountable in this civil rights action for the things that happened to him just because the classifications chief placed and kept Santiago at CCI. Russel Leik placed Mr. Santiago at CCI after consulting with the health services staff and after he was assured that those health care professionals could care for Mr. Santiago at CCI. Admittedly on more than one occasion Mr. Santiago requested a transfer to the Waupun

Correctional Institution. However, the undisputed facts submitted to the circuit court established that Waupun was not a better place for Santiago at the time in question.

Mr. Santiago's claims are essentially that Mr. Leik failed to transfer Santiago to an institution with allegedly better medical facilities. However, as previously stated, the facts showed that WCI would not have provided Santiago with any qualitatively or quantitatively better care.

REASONS WHY THIS COURT SHOULD GRANT THE PETITION.

A. The circuit court's denial of defendants' request for qualified immunity is a final decision that should be immediately appealable as a matter of right.

When a civil rights action is brought in state court, federal substantive law must apply. Felder, 487 U.S. 131. State procedural rights only apply if they do not obliterate the federal right. Maine v. Thiboutot, 448 U.S. 1, 10-11 (1980). The defendants maintain that the Wisconsin Court of Appeals did not have the authority to disregard the defendants' substantive right to immediately appeal a lower court's denial of qualified immunity. The right to such an appeal is not merely a procedural right, but is a substantive right inextricably tied to the immunity afforded under the doctrine of qualified immunity.

Among the elements of federal substantive law, which it is assumed that state courts are competent to fully adjudicate in actions brought pursuant to federal statutes, is the ability to fully protect the immunity defenses for state officials who are sued in state court. These immunity defenses include the defense of qualified

immunity. The right to an immediate appeal from a denial of the qualified immunity defense is necessary and concomitant with the parties', and the court's, ability to fully adjudicate the immunity defense. Felder, 487 U.S. at 138-41; Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Butz v. Economou, 438 U.S. 478, 502 n.30 (1978). Therefore, denying the defendants their right to immediate appellate review on the immunity question is tantamount to denying the defendants a full and complete opportunity to present their immunity defense and is contrary to substantive federal law.

Federal courts have acknowledged that part of the qualified immunity defense is the right to directly and immediately appeal an adverse decision. In Mitchell v. Forsyth, 472 U.S. 511 (1985), this Court expressly recognized the right to take a direct appeal of adverse qualified immunity determinations. This Court:

> recognized [qualified immunity is] an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.

Id., 472 U.S. at 526 (emphasis supplied).

This Court allowed a direct appeal of an interlocutory matter as of right, under the "collateral order doctrine," in Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949). Cohen recognizes a species of order in federal practice which finally determine rights separable from and collateral to rights asserted in the action, and which are too important to be denied review, and too independent from the cause itself to defer appellate consideration until the whole case is

adjudicated. Id., 337 U.S. at 546. An adverse determination of a public official's qualified immunity falls into this category because the entitlement not to stand trial is lost if not reviewed before the trial commences.

This Court in Mitchell held:

> The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, **the district court's decision is effectively unreviewable on appeal from a final judgment.**

Mitchell, 472 U.S. at 526-27 (emphasis in original; bold supplied).

The Wisconsin Court of Appeals in this case concluded that "[t]he order denying the motion for summary judgment is not appealable as of right. The order is not final. It does not dispose of the entire matter in litigation as to one or more of the parties. Section 808.03(1), STATS." (Slip op. at 2.) The Wisconsin Supreme Court refused to review the lower court's decision.

Addressing this point in Mitchell, this Court came to the opposite conclusion:

> An appealable interlocutory decision must satisfy two additional criteria: it must "conclusively determine the disputed question," Coopers & Lybrand v. Livesay,

> 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978), and that question must involve a "clai[m] of right separable from, and collateral to, rights asserted in the action," Cohen, [337 U.S. 541 (1949)] supra, at 546, 69 S.Ct., at 1225. The denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets these requirements.

Mitchell, 472 U.S. at 527. Thus, this Court held that a qualified immunity determination was sufficiently separable from the underlying controversy to warrant and justify immediate appeal.

The Wisconsin Court of Appeals rejected the Mitchell holding by simply noting "that is the federal rule." (Slip op. at 2.) The defendants submit that the Wisconsin Court of Appeals cannot so easily ignore the "federal rule" in the context of a lawsuit filed pursuant to 42 U.S.C. § 1983. In fact, the defendants submit that the court of appeals' decision conflicts with this Court's decision in Felder.

In Felder, this Court rejected an attempt by the Wisconsin courts to limit a § 1983 action by interposing an exhaustion requirement. Describing the supremacy of federal law, this Court wrote:

> Just as federal courts are constitutionally obligated to apply state law to state claims, see Erie, supra, 304 U.S. [64 (1938)], at 78-79, 58 S.Ct., at 822-823, so too the Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." Garrett v. Moore-

McCormack Co., 317 U.S. 239, 245, 63 S.Ct. 246, 251, 87 L.Ed. 239 (1942).

. . . .

> . . . A law that predictably alters the outcome of § 1983 claims depending solely on whether they are brought in state or federal court within the same State is obviously inconsistent with this federal interest in intrastate uniformity.

Felder, 487 U.S. at 151, 153.

Here, the defendants request this Court grant this petition for the purpose of establishing that the Supremacy Clause imposes on state courts a constitutional duty to proceed in the same manner in deciding immunity questions as would the federal courts. More specifically, the defendants request this Court grant the petition for the purpose of directing the state courts to provide defendants with immediate appellate review of lower court decisions denying qualified immunity.

B. The majority of the state courts which have considered the question have found that there is immediate appellate review after an adverse qualified immunity determination.

The Wisconsin courts' decision is inconsistent with the majority of the decisions of the other states which have considered this question. The majority of states which have considered this question have concluded that a direct appeal should be allowed, either by expansion of existing state laws or by recognizing the binding effect of Mitchell. Those states approving direct appeals are: Robinson v. Beaumont, 725 S.W.2d 839 (Ark. 1987);

Henke v. Superior Court, 775 P.2d 1160 (Ariz. Ct. App. 1989); Durso v. Taylor, 624 A.2d 449 (D.C. 1993); Lord v. Murphy, 561 A.2d 1013 (Me. 1989); Breault v. Chairman of Bd. of Fire Com'rs, 513 N.E.2d 1277 (Mass. 1987); Anderson v. City of Hopkins, 393 N.W.2d 363 (Minn. 1986); Richardson v. Chevrefils, 552 A.2d 89 (N.H. 1988); Corum v. University of North Carolina, 413 S.E.2d 276 (N.C. 1992); Fann v. Brailey, 841 S.W.2d 833 (Tenn. Ct. App. 1992); Park County v. Cooney, 845 P.2d 346 (Wyo. 1992).

Two states allowed review, but not through the mechanism of a direct appeal: McLin v. Trimble, 795 P.2d 1035 (Okla. 1990) (not allowing a direct appeal from a denial of summary judgment on the qualified immunity issue but holding that review was proper through an original action); Carrillo v. Rostro, 845 P.2d 130 (N.M. 1992) (not allowing a direct appeal from a denial of summary judgment on the qualified immunity issue but allowing review through the invocation of the collateral order doctrine invoked through a writ of error).

Six states have denied immediate appellate review: Tucker v. Resha, 610 So. 2d 460 (Fla. Dist. Ct. App. 1992); Klindtworth v. Burkett, 477 N.W.2d 176 (N.D. 1991); Turner v. Giles, 450 S.E.2d 421 (Ga. 1994).[3] Pizzato's Inc. v. City of Berwyn, 523 N.E.2d 51 (Ill. App. Ct. 1988); Ohio Service Emp. Ass'n v. Moritz, 529 N.E.2d 1290 (Ohio App. 1987); Noyola v. Flores, 740 S.W.2d 493 (Tex. Ct. App. 1987).

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[3] A petition for writ of certiorari in the Turner case was denied by this Court. In the Turner case, although the state court did not allow for an appeal as a matter of right, it did allow the appeal implying that if it was discretionary, an appeal would always be permitted.

C. Defendants will suffer a substantial and irreparable injury by being deprived of an appellate review of the lower court's denial of qualified immunity prior to trial on the merits.

Qualified immunity is immunity from suit. This Court has emphasized that immunity questions should be decided at the earliest possible stage to shield officers from the disruptive effects of broad ranging discovery and the effects of litigation. Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987). The result of the Wisconsin court's decision is that state officers will not be shielded from immunity before trial.

The substantial and irreparable harm to the defendants is manifest. The defendants will suffer substantial or irreparable injury by the denial of their federal substantive right to be free from a trial on damages as set forth in the decision of the United States Supreme Court in Mitchell, 472 U.S. 511 (1985) and the defendants will suffer irreparable harm by being required to stand trial for damages.[4] In this case, that is the only issue to be decided.

Proceeding to trial without appellate review on the immunity question subjects the state officer defendants who have substantial claims of qualified immunity to the distraction, inconvenience and expense of discovery and trial. If they are erroneously forced to stand trial, they will have lost the benefit of the immunity, even if they are

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[4] The refusal to dismiss a particular defendant on immunity grounds is not only an irreparable harm to the particular defendants not dismissed, but may harm any defendants remaining for trial.

ultimately found not liable. This is precisely the sort of harm which caused this Court to require that qualified immunity denials be immediately appealable as a matter of right in the federal courts. To do otherwise in state court, qualified immunity denials would create prohibited outcome-determinative procedures which obliterate the federal substantive immunity. See Felder, 487 U.S. at 140, 147; Thiboutot, 448 U.S. at 10-11.

D. Denying defendants the right to an immediate appeal will discourage defendants with colorable immunity claims from subjecting themselves to the jurisdiction of any court but the federal courts.

The decision of the Wisconsin court to deny the defendants the right to take an immediate appeal from a decision denying a demand for qualified immunity discourages state officials from subjecting themselves to the jurisdiction of the state courts. The undoubtable consequence of the Wisconsin court's decision is to remove those cases to federal court where the defendants possess a colorable qualified immunity defense. The federal court practice of an immediate appeal clearly provides those litigants with a greater assurance of a full, fair and complete review of their immunity defense. The same cannot be said in those state courts where there is no appellate review provided on a decision denying the defendant's claim of qualified immunity.

CONCLUSION

If a state chooses to provide a forum for § 1983 actions, it may not elevate state procedures over substantive federal law in that area. Felder, 487 U.S. 131. The conflict created by the Wisconsin courts concerning the availability of immediate appellate review

of adverse qualified immunity determinations results in a non-uniform treatment of § 1983 causes of action depending on whether the action is brought in state or federal court.

Since this Court's decision in Felder, Wisconsin courts must adjudicate federal claims consistent with the way federal courts have recognized substantive federal rights. The Wisconsin courts' summary rejection of the "federal rule" must be corrected. This court can accomplish this result by granting this petition for writ of certiorari.

Respectfully submitted,

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June 26, 1995

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Office of the Clerk

SUPREME COURT

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May 10, 1995

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(Additional Addresses on Page Two)

You are hereby notified that the Court has entered the following order:

Nos. 95-0778
and 95-1180-W

Santiago v. Leik and Lloren and
State ex rel. Leik and Lloren v.
District IV Court of Appeals
L.C.#87CV5987

Petitions for review and for supervisory writ having been filed on behalf of defendants-appellants-

petitioners, Russell Leik and Jose Lloren, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs;

IT IS FURTHER ORDERED that the petition for supervisory writ is denied, ex parte.

Marilyn L. Graves
Clerk of Supreme Court

Hon. Robert D. Sundby
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DISTRICT IV

Office of the Clerk

COURT OF APPEALS

OF WISCONSIN

Marilyn L. Graves
Clerk

March 30, 1995

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Judith Coleman Nispel
Trial Court Clerk
Dane Co. Courthouse
(L.C. #87-CV-5987)

Hon. P. Charles Jones
Dane Co. Courthouse

You are hereby notified that the Court entered the following opinion and order:

95-0778 Jaime Santiago v. Russell Leik and Jose Lloren

Before Eich, C.J., Gartzke, P.J. and Sundby, J.

We previously held that the defendants in this appeal have no qualified immunity. Santiago v. Leik, 179 Wis.2d 786, 508 N.W.2d 456 (Ct. App. 1993). We remanded the matter of [sic] the trial court for further proceedings. On remand, the defendants brought various facts to the trial court's decision, on the strength of which the trial court permitted defendants to file a second motion for summary judgment dismissing the complaint on grounds of qualified immunity and that there are no material issues of fact. The defendants have appealed

from the order denying their motion for summary judgment, and Santiago has moved to dismiss the appeal on grounds that the defendants should not be permitted to relitigate the issue. Santiago urges haste because he is dying of ALS.

The order denying the motion for summary judgment is not appealable as of right. The order is not final. It does not dispose of the entire matter in litigation as to one or more of the parties. Section 808.03(1), STATS. Barnhill v. Bd. of Regents, 166 Wis.2d 395, 415, 479 N.W.2d 917, 925 (1992), does not hold that an order denying a motion to dismiss a complaint on summary judgment on qualified immunity grounds is a final order. As the Barnhill court noted, that is the federal rule. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). The Barnhill court dealt with the issue of qualified immunity after the case had been tried on the merits, exercising its "law-making function." Barnhill, 166 Wis.2d at 416, 417, 479 N.W.2d at 925.[1] Our supreme court has never departed from the final order rule, even when double jeopardy has been claimed and rejected by the trial court. See State v. Jenich, 94 Wis.2d 74, 97a, 288 N.W.2d 114, 117 (1980).

Because the order denying the defendants' motion to dismiss the complaint is not final, defendants' appeal must be dismissed. On occasion, we have treated appeals from nonfinal orders as petitions for leave to appeal, granted the petitions and dealt with the merits. We decline to do so here.

The federal courts have noted that defendant may use sequential Forsyth appeals of pretrial rulings on

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[1] Burkes v. Klauser, 185 Wis.2d 309, 517 N.W.2d 503 (1994) is also not to the contrary. That appeal commenced with a petition to this court for leave to appeal, which we granted.

qualified immunity to Santiago's detriment. For that reason, the right to qualified immunity has been held waivable. See discussion in Yates v. City of Cleveland, 941 F.2d 444, 448 (6th Cir. 1991).

Santiago's claims relate to events occurring between October 20 and up to November 20, 1987. See Santiago v. Leik, 179 Wis.2d 789, 508 N.W.2d at 457. We decided the first appeal in the fall of 1993. 179 Wis.2d at 786, 508 N.W.2d at 456. Considering Santiago's medical condition, we decline to treat this appeal as a petition for leave to appeal. We therefore remand the matter to the trial court for further proceedings.

IT IS ORDERED that this appeal is dismissed.

Marilyn L. Graves
Clerk of Court of Appeals